IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 36

CLIFTON WHITLEY, ET AL.,
Appellants,

v.

JOHN BELL WILLIAMS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

## MOTION TO DISMISS OR AFFIRM


JOE T. PATTERSON
Attorney General of the State of Mississippi

[redacted]
Assistant Attorney General of the State of Mississippi

Attorneys for Appellees

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

## No. 1174

CLIFTON WHITLEY, ET AL.,
*Appellants,*

VS.

JOHN BELL WILLIAMS, GOVERNOR OF THE STATE OF MISSISSIPPI, ET AL.,
*Appellees.*

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

## MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a) and 1(c) of the Rules of this Court, John Bell Williams, et al., Appellees,

move that the appeal be dismissed, or, alternatively, that the Judgment of the District Court be affirmed.

## QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In Finding that Section 3260 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C., Section 1973(c)) so as to require compliance with said Section 5 by the State of Mississippi, prior to enforcing or applying Section 3260, as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

## STATEMENT OF THE CASE

This case deals solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 3260 of the Mississippi Code, as amended.

Appellants, in their original Complaint, charged that Section 3260 of the Mississippi Code, as amended, being House Bill 68 of the Laws of the 1966 Session of the Legislature, violates 42 U.S.C. 1971(a) and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in addition to coming within the purview of Section 5 of the Voting Rights Act of 1965. These claims were completely eliminated by the stipulation entered into prior to the final Judgment of the District Court. (Pages 6a and 7a, Appendix to Appellees' Jurisdictional Statement)

## ARGUMENT

### Section 3260 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A., Section 1973c)

This suit is brought by a group of individuals purporting to represent a class of individuals who seek or desire to become candidates for various public offices in Mississippi. We submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "Mr. Corman: 'We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964. Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?'
>
> Mr. Marshall: 'The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort I would like to see it corrected, but that is not what we were trying to deal with in the bill.'"

We submit to the Court that Section 3260, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting

Rights Act of 1965 is entitled, "An Act to Enforce the Fifteenth Amendment to the Constitution of the United States and for Other Purposes." The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation will insure that properly registered individuals *are not prohibited from voting.*"

This case involves a question that turns upon construction of a federal statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the

Court must extract the meaning most appropriate. *Local 1976, U.B.C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "qualification", "prerequisite", "standard", "practice or procedure", five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c, thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted, ". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words, "qualification", "prerequisite", "standard", "practice or procedure" are to be applied exclusively to "vote" or "voting", as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep", are limited as they apply to "vote" or "voting", and do not apply to the candidates who are voted upon.

The Amendment to Section 3260 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing

with vote or voting, but deals exclusively and solely with the method by which public officers in Mississippi will be chosen. Determination of the method by which a public official is to be elected is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act. (42 U.S. C.A. 1973c) This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word, "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 3260 of the Mississippi

Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provides the method by which a candidate for public office can have his name printed on the official ballot.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKessen & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 3260, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting*, and we had to litigate the *new qualifications for voting*." (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"

ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices—

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices.' And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right;* and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which has been precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a common-sense method of insuring that literacy tests and similar devices are not replaced by other vehicles of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of prac-

tice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "standards, practices or procedures" in lieu of the simple word "procedure". This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to

register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A., Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 3260, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A., Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A., Section 1973b(a). This clearly shows the intent of Congress to include in the terms "qualifications", "prerequisites", "standards", "practices", or "procedures", only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A., Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an apparent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (USCA, Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially, discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number

536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 USCA, Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to dismiss or affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert therein, invidious discrimination. *Dusch* v. *Davis*, 18 L. Ed. 2d 656, 660.

## CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and that no substantial question on the merits has been raised or presented by the Jurisdictional Statement filed herein by the appellants. Therefore, the Motion of Appellees to Dismiss

the Appeal should be sustained or alternatively the Judgment of the District Court be affirmed.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of the State of Mississippi
WILL S. WELLS
Assistant Attorney General of the State of Mississippi
*Attorneys for Appellees*